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Supreme Court, U.S.
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No. 96-764

In The

Supreme Court of the United States

October Term, 1996

THE SHAW AGENCY AND SCOTT HANKINS,

Petitioners,

vs.

MARGERY MORSTEIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Are state law claims against an independent insurance agent and agency for fraud and negligence, which claims do not affect the relations among principal ERISA entities, preempted by the Employee Retirement Income Security Act of 1974 (ERISA).

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STATEMENT OF THE CASE

Petitioner Scott Hankins is an insurance agent, and is an independent insurance broker in the State of Georgia. Petitioner Hankins is employed by Petitioner The Shaw Agency. In 1991 the Petitioner met with the Respondent and introduced to the Respondent a policy of major medical insurance. The Petitioner completed an application form, which the Respondent signed. Through the Petitioners, Respondent Margery Morstein applied for a policy of major medical insurance administered by National Insurance Services and underwritten by Pan American Life Insurance Company. A policy was issued, but rescinded when the Respondent submitted claims for hip replacement surgery more than a year after the policy was issued. The rescission was based upon allegations by National Insurance Services that the Respondent failed to disclose on her application a preexisting medical condition.

The Respondent claims that the Petitioners fraudulently induced her into purchasing the policy of major medical insurance from National Insurance Services and, in doing so, allowing a separate policy of full coverage major medical insurance to lapse. The Respondent also alleges that the Petitioners were negligent in processing her application for insurance with Pan American Life Insurance Company.

The Respondent has state law claims against the Petitioners based in negligence and fraud. The Respondent's claims against the Petitioners arise under causes of action created by the laws of the State of Georgia.

The Petitioners are the agents of Respondent, and are not agents of the insurance company. The Respondent's claims herein are not asserted against a party in interest to an ERISA Plan and do not affect the relations between traditional ERISA entities.

The Respondent filed an action in the state court alleging malfeasance, negligence, misrepresentations, and breach of contract. The case was removed to the district court, where a summary judgment was awarded to the Petitioners. A three judge panel of the Eleventh Circuit affirmed the judgment of the district court. However, a review of the panel decision by the full circuit, sitting *en banc*, resulted in a unanimous decision reversing the judgment of the district court.

REASONS FOR DENYING THE WRIT

I.

CIRCUIT COURTS DO NOT REQUIRE GUIDANCE ON THE SUBJECT MATTER OF THIS PETITION.

The Petitioners fail to argue that the question presented is one on which the lower courts are deeply divided, or even one that frequently arises and on which this Court must offer guidance. In fact, this is the first reported case found by the Respondent since this Court decided *New York Conference of Blue Cross & Blue Shield v. Travelers Insurance Company*, __ U.S. __, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (hereinafter "*New York Blues*") in which a court of appeals has considered the preemption of fraud and negligence claims against an insurance agent or insurance company.

The analysis applied by the Eleventh Circuit is consistent with analyses of other circuit courts involving parties to some extent distanced from ERISA. For example, a panel from the Fifth Circuit Court of Appeals unanimously held that state law claims against an insurance agent were not preempted by ERISA in a case factually similar to the facts in the instant case. *Perkins v. Time Insurance Co.*, 898 F.2d 470 (5th Cir. 1990). The Fifth Circuit held that ERISA did not preempt the insured's

state law claims against the insurance agent because the agent's actions were "only indirectly" related to an ERISA plan. *Perkins*, 898 F.2d at 473.

The Ninth Circuit Court of Appeals held that state law claims of a third party medical provider against an employee benefit health plan fell outside the "bounds of the ERISA 'relates to' standard because neither [the plaintiff] nor [the former employee] had any existing ties to the ERISA plan . . ." *The Meadows v. Employers Health Insurance*, 47 F.3d 1006 (9th Cir. 1995). The Ninth Circuit has analyzed the relationships among parties when considering ERISA preemption. *General American Life Insurance Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993).

The Tenth Circuit Court of Appeals held that preemption does not apply to a third party provider of an ERISA employee benefit plan. *Hospice Of Metro Denver, Inc. v. Group Health Insurance Of Oklahoma, Inc.*, 944 F.2d 752 (10th Cir. 1991). The Tenth Circuit examined threshold for preemption analysis:

> a state law claim which does not affect the "relations" among the principal ERISA entities, the employer, the plan, the plan fiduciaries, and the beneficiaries" as such, is not pre empted by ERISA. [Citations omitted.]

Id., at 756.

The decision of the Fifth Circuit fits squarely with the lower court in the instant case, and opinions from the Ninth and Tenth Circuit Courts of appeal are in harmony with the reasoning of the Eleventh Circuit, sitting *en banc*, in the instant case. There is no tension among the circuits requiring intervention by this Court in the case *sub judice*.

II.

THE *EN BANC* DECISION BELOW FOLLOWS PRECEDENT FROM THIS COURT.

The unanimous *en banc* decision below demonstrates a clear understanding and well-founded reliance on precedence from this Court regarding ERISA preemption.

The Eleventh Circuit examined *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). The Circuit Court considered this Court's discussion of when a law "relates to" an ERISA plan, and quoted the now famous footnote 21 of that opinion[1] which confirms that the breadth of ERISA preemption is subject to reasonable limitations.

The Circuit Court also reviewed *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41 (1987), in which this Court easily disposed of the preemption issue, which was not the dominant issue, and in which this Court wrestled with the insurance savings clause of ERISA, which was the primary focus of the *Pilot Life* analysis.

The Eleventh Circuit considered *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), in which an employee asserted claims against his employer for unlawful discharge. The Circuit Court followed this Court's guidance pertaining to the "relates to" language of ERISA.

> [I]n order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan

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1. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law relates to 'the plan'." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, 103 S. Ct. 2890, 2901 (1983).

> exists and the employer has a pension-defeating motive in terminating the employment. Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relates to' and ERISA Plan.

Id. at 140, 111 S. Ct. at 483. *(Petition,* at A-14.) The factors that this Court found to be dispositive in *Ingersol-Rand* are not present in the case *sub judice*; there is no need to find either the existence of an ERISA plan, or that the Petitioners herein acted to defeat the Respondent's benefits under a plan, in order for the Respondent to prevail in her claims against the Petitioners.

Finally, the Circuit Court followed the broad guidance of *New York Conference of Blue Cross & Blue Shield v. Travelers Insurance Company,* __ U.S. __,115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (hereinafter "*New York Blues.*") The Eleventh Circuit gleaned from the holding in *New York Blues* that laws having only an indirect economic effect on an ERISA plan are not preempted. The Circuit court acknowledged the usefulness of the "connection with" analysis provided in *New York Blues,* and applied that analysis to reach its decision.

The Petitioners have suggested to this Court that the eleven judges of the Eleventh Circuit "misread" *New York Blues. (Petition,* at p. 6.) The Petitioners have chosen to ignore the precedential value of *New York Blues* and, instead, direct this Court to a definition in *Shaw v. Delta Airlines,* 463 U.S. 85 (1983), where the Court indicated that "a law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan." *Shaw,* 498 U.S. at 139. The Petitioners argue that the Eleventh Circuit dropped the ball on a *Shaw* analysis not because the court found that the Respondent's claims do not "relate to" a plan, but because the court did not analyze

whether the Respondent's claims have "reference to" or a "connection with" a plan. (*Petition*, at pp. 8-9.) This argument distorts the holding in *Shaw*. The *Shaw* Court wrestled with the fundamental meaning of "relate" and looked to *Black's Law Dictionary* for a assistance.[2] In *Shaw*, this Court chronicled the legislative history of ERISA and the relationship of the state laws to fringe benefits, which benefits the Court found to be included in ERISA. *Shaw* did not mandate a bright line test for preemption analysis, as suggested by the Petitioners.

New York Blues provides support to deny certiorari beyond that enumerated in the opinion of the lower court. In *New York Blues*, this Court observed that "we have never assumed that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law." *New York Blues*, 115 S. Ct. at 1676. *New York Blues* looked at *Metropolitan Life v. Taylor*, 481 U.S. 58 (1987) to affirm the proposition that "laws that regulate only the insurer, or the way in which it may sell insurance, do not 'relate to' benefit plans." *New York Blues*, 155 S. Ct. at 1681. A significant distinction between *New York Blues* and other cases where this court has tackled the sticky issue of ERISA preemption is that, in *New York Blues*, one of the parties was clearly not a party in interest to ERISA, while in substantially all of the other cases before this Court the parties were presumably parties in interest to ERISA. *See* Section III, *infra*. The observations of this Court in *New York Blues* provide unfailing support for position of the Eleventh Circuit, and dispose of arguments asserted by the Petitioners in their effort to induce this Court into granting a writ of certiorari.

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2. "See Black's Law Dictionary 1158 (5th ed. 1979) ('Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with' ". *Shaw*, 463 U.S. at 87, 103 S. Ct. at 2900, n 16.

III.

THE DECISION OF THE ELEVENTH CIRCUIT IS CONSISTENT WITH THE POLICIES UNDERLYING ERISA.

The decision of the Circuit court promotes the goals of ERISA. The fundamental goal of ERISA is to protect employee benefits. Congress passed ERISA in order to:

> protect . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Section 2, as set forth in 29 U.S.C. § 1001(b).

When drafting ERISA, Congress categorized persons and entities having an "interest" in ERISA.[3] Accordingly, interested

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3. The term "party in interest" means, as to an employee benefit plan —

> (A) any fiduciary (including but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
>
> (B) a person providing services to such plan;

(Cont'd)

persons or entities include anyone involved with the

(Cont'd)

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of —

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15) of any individual describe in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of —

(i) the combined voting power of all classes of stock of each corporation,

(ii) the capital interest or profits interest of such partnership, or

(Cont'd)

administration, payment, or receipt of benefits under a qualifying plan. Parties in interest are responsible for the prudent administration of employee benefits. Section 1002 plainly identifies those entities to whom ERISA applies and, by extension, indicates entities to whom ERISA should not apply. Claims affecting only an independent insurance agent and his agency, neither of whom are a party in interest to ERISA, demand careful scrutiny in the context of ERISA preemption. The *en banc* decision of the Circuit Court reflects this level of scrutiny.

The Circuit Court commented that *New York Blues* ". . . turned the tide on the expansion of the preemption doctrine . . ." *Petition*, at A-15. This observation is supported by language in *New York Blues*. "[T]he provisions for surcharges do not 'relate to' employee benefit plans within the meaning of ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a), and accordingly *suffer no preemption*." [emphasis added] *New York Blues*, 115 S. Ct. At 1674. The sentiment of this Court, that ERISA preemption would cause the appellants to *"suffer"*, is not capricious. The punitive nature of ERISA preemption has been acknowledged by this Court. The cardinal intent of "protect[ing] . . . participants in employee benefit plans and their beneficiaries" would be trampled if ERISA preemption is blindly applied to deprive employees of claims, regardless of

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(Cont'd)

> (iii) the beneficial interest of such trust or estate,
>
> * * *
>
> (I) a 10 percent or more (directly or indirectly in capital profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

29 U.S.C. § 1002(14).

the *de minimis* impact of claims on the regulation or administration of employee benefit plans.

The *en banc* holding of the lower court does not increase the exposure that the Petitioners would face outside of ERISA. It does, however, further the beneficial objectives of ERISA by monitoring misconduct of independent insurance agents. Efforts to apply ERISA preemption for the purpose or effect of immunizing independent insurance agents from personal liability for misconduct, at the expense of employees, "would not promote th[e] objective" of ERISA. *(Petition,* at A-21.)

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter because the unanimous opinion of the Eleventh Circuit Court of Appeals is not in conflict with the decisions of this Court or with the decisions of other Circuit Courts, and promotes the policies of ERISA. The Petitioners have presented no compelling reason for a review of this matter.

Accordingly, the Petition for Writ of Certiorari should be denied.

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